Perusahaan Sinar Jaya Sdn Bhd v Etiqa Insurance Bhd

HIGH COURT (KUALA LUMPUR) — ADMIRALTY IN PERSONAM NO 27–7–02 OF 2012
NALLINI PATHMANATHAN J
30 JANUARY 2013

Insurance — Marine insurance — Hull insurance — Indemnity — Grounding accident of barge — Policy covered loss due to perils of seas, rivers, lakes or other navigable waters — Sale of barge and claim for balance of losses — Denial of liability from insurance's company — Whether barge was overloaded when accident occurred — Lapse of policy due to non-payment of premium — Whether defendant was entitled to invoke deferred premium clause to deny liability given its previous conduct — Deferred premium clause — Whether insurer estopped from relying on ground that policy had lapsed

The plaintiff, a general contractor and supplier of building materials and equipment, owned a fleet of tugs and barges which were deployed under charter arrangements to carry out shipment of material. As a result of a grounding incident on 18 December 2010, the barge owned by the plaintiff capsized and the plaintiff sought indemnity from the defendant, an insurance company. Clause 6.1.1 of the policy covered by the defendant covered loss due to perils of the seas, rivers, lakes or other navigable waters. The barge became a sunken wreck and as it posed a shipping hazard, the plaintiff was required to remove the wreck by the marine department. The plaintiff sold the vessel for scrap and received the sum of RM350,000. The plaintiff then sought the balance of its losses from the defendant on the grounds that such loss was prima facie covered under the policy. The defendant denied liability and argued that the plaintiff was in breach of a warranty against overloading. The defendant relied on a draft survey report and further argued that, at the maximum allowable load was only up to a maximum of 5,000 metric tons. The defendant submitted that all material times, the barge was carrying 5,406.54 metric tons of granite and this meant that it was overloaded. The plaintiff contended the barge was initially loaded on the night of 17 December 2010 up to a load of about 5,400 metric tons and the vessel did not depart because of the excess load. Instructions were given for the cargo to be discharged such that the load would fall within 4,800 and 5000 metric tons pursuant to a fixture note entered into for this shipment. Such discharge was carried out until the cargo fell within the acceptable load of about 5,000 metric tons. That the vessel was only loaded to 5,000 tons was, the plaintiff maintained, borne out by a second draft survey report conducted after discharge of the excess load had been completed. The defendant also argued that in April 2011, the policy had lapsed due to non-payment of premium. The policy contained a deferred premium

clause which provided that premium was to be paid by an instalment structure comprising four quarterly payments. As such the defendant maintains by invoking the deferred premium clause that the policy had lapsed and that the plaintiff is not therefore entitled to cover under the same. The plaintiff maintained that the defendant has, by conduct, waived its right to rely on the clause. The conduct relied upon by the plaintiff as comprising the factual matrix to support the claim of waiver is that the defendant had, in the past, consistently accepted payment of premium however late it was, and notwithstanding that it did not fall within the instalment structure set out in the deferred premium clause. The defendant maintained coverage throughout, despite these lapses. The plaintiff contended that this created an estoppel which precluded the defendant from relying on the same to contend that the policy had lapsed. The issues for the court's determination were: (i) whether there was a breach of the warranty relating to over loading? In other words was the barge overloaded on 18 December 2010; and (ii) whether the defendant was entitled to invoke the deferred premium clause to deny liability given its previous conduct.

Held, allowing the claim:

(1) There was no breach of the warranty contained in the Marine Hull Policy, which precluded the plaintiff from making claim under the same. While the barge was initially overloaded on 18 December 2010, it did not set sail in this overloaded condition. An unloading or discharge operation proceeded after the first draft survey had been completed, resulting in a discharge of some 400 metric tons of the cargo. As such when the vessel set sail on 18 December 2010 it was not overloaded and there was accordingly no breach of the Marine Hull Policy (see para 71).

(2) For waiver to bite, the defendant must have known or had the opportunity of knowing the true state of facts. At the time of the incident, they were checking whether or not the deferred premiums were up to date. The plaintiff had from the commencement of its relationship with the defendant, paid all premiums to the defendant's Tawau office by direct transfer to the defendant's account. The records of payment were therefore at all material times with the Tawau office. The state of affairs of the monies due on the plaintiff's account would, at all times have been within the knowledge of, and in the records of the defendant at its office in Tawau. This was sufficient to impute or infer knowledge of the defendant as to the true state of affairs of the instalments due by way of deferred premiums (see para 116).

(3) The defendant's conduct in accepting the renewal payments as late as three to five months after they were due coupled with payment out on two incidents during this time warrant the inference that the defendant unequivocally represented to the plaintiff that it was prepared to forbear

or excuse the strict application of the deferred premium clause in respect of the respective policies that were issued in favour of the plaintiff (see para 118(a)).

(4) The two primary issues falling for adjudication have been determined in the plaintiff's favour. The plaintiff was entitled to judgment as prayed for and costs. The conduct of the defendant in continuing to accept, without objection, renewal premiums which were overdue, amounted not only to a waiver of the forfeiture or cessation of the policy as stipulated, but to a general waiver for the future of the condition in the policy requiring payment on a particular date (see paras 118(f) & 120).

[Bahasa Malaysia summary

Plaintif, kontraktor am dan pembekal bahan dan peralatan pembinaan, memiliki sebuah armada kapal tunda dan tongkang yang digunakan di bawah urusan sewa khas untuk melakukan penghantaran bahan. Akibat daripada kejadian hentakan pada 18 Disember 2010, tongkang yang dimiliki oleh plaintif telah terbalik dan plaintif memohon indemniti daripada defendan, sebuah syarikat insurans. Fasal 6.1.1 polisi itu melindungi defendan daripaa kerugian akibat bencana laut, sungai, tasik atau perairan yang boleh dilayari. Tongkong itu menjadi bangkai kapal karam yang tenggelam dan oleh kerana ia menyebabkan bahaya kepada perkapalan, plaintif dikehendaki mengalihkan bangkai kapal karam itu oleh jabatan marin. Plaintif telah menjual kapal itu untuk besi buruk dan menerima sejumlah RM350,000. Plaintif kemudian memohon baki kerugiannya daripada defendan atas alasan bahawa kerugian sedemikian adalah dilindungi secara prima facie di bawah polisi. Defendan menafikan liabiliti dan berhujah bahawa plaintif telah melanggar waranti yang menghalang muatan berlebihan. Defendan bergantung kepada draf laporan kaji selidik dan selanjutnya berhujah bahawa, muatan maksimum yang dibenarkan hanya sehingga maksimum 5,000 tan metrik. Defendan berhujah bahawa pada setiap masa matan, tongkang itu membawa granit seberat 5,406.54 tan metrik dan ini bermaksud bahawa ia terlebih muatan. Plaintif berhujah tongkang itu pada mulanya dimuatkan pada malam 17 Disember 2010 sehingga lebih kurang 5,400 tan metrik dan kapal itu tidak berlepas kerana muatan lebihan itu. Arahan diberikan untuk kargo itu dilepaskan yang mana muatan itu harus terangkum dalam 4,800 dan 5,000 tan metrik menurut nota lekapan yang dimasuki untuk penghantaran ini. Pelepasan sedemikian telah dilakukan sehingga kargo itu terangkum dalam muatan yang boleh diterima iaitu 5,000 tan metrik. Kapal tersebut hanya dimuatkan 5,000 tan, sepertimana dihujahan plaintif, telah dinyatakan dalam draf laporan kaji selidik kedua yang telah dilakukan setelah pelepasan muatan lebihan selesai. Defendan juga berhujah bahawa dalam bulan April 2011, polisi itu telah luput kerana premium yang tidak berbayar. Polisi itu mengandungi yang memperuntukkan bahawa premium perlu fasal premium tertunda dibayar melalui struktur ansuran yang terdiri daripada bayaran setiap empat bulan.

Oleh itu defendan menegaskan dengan menggunakan fasal premium tertunda bahawa polisi itu telah luput dan bahawa plaintif tidak berhak berlindung di bawahnya. Plaintif menegaskan bahawa defendan telah, melalui perbuatan, mengetepikan haknya untuk bergantung kepada fasal itu. Plaintif bergantung kepada tindakan defendan yang terdiri daripada fakta matriks untuk menyokong tuntutan penepian adalah bahawa defendan telah, pada masa lalu, secara konsisten telah menerima bayaran premium selewat manapun, dan walaupun ia bukan dalam strutur ansuran yang ditetapkan dalam fasal premium tertunda itu. Defendan mengekalkan perlindungan sepanjang masa tersebut, meskipun kelewatan-kelewatan tersebut. Plaintif berhujah bahawa ini membentuk estopel yang menghalang defendan daripada bergantung kepada yang sama untuk berhujah bahawa polisi itu telah luput. Isu-isu untuk penentuan mahkamah adalah: (i) sama ada terdapat pelanggaran waranti berkaitan muatan lebihan. Dalam ertikata lain adakah tongkang itu terlebih muatan pada 18 Disember 2010; dan (ii) sama ada defendan berhak untuk menggunakan fasal premium tertunda untuk menafikan liabiliti berdasarkan perbuatan lampaunya.

Diputuskan, membenarkan tuntutan:

(1) Tiada pelanggaran waranti terkandung dalam Polisi Badan Kapal Marin, yang menghalang plaintif daripada membuat tuntutan di bawah yang sama. Jikapun tongkang itu pada mulanya terlebih muatan pada 18 Disember 2010, ia tidak belayar dalam keadaan terlebih muatan itu. Pemunggahan muatan atau operasi pelepasan yang berlaku selepas draf pertama kaji selidik selesai mengakibatkan pelepasan lebih kurang 400 tan metrik ke atas muatan itu. Oleh itu semasa kapal itu hendak belayar pada 18 Disember 2010 ia tidak terlebih muatan dan oleh demikian tiada pelanggaran Polisi Badan Kapal Marin (lihat perenggan 71).

(2) Untuk penepian berlaku, defendan perlu mengetahui atau mempunyai peluang untuk mengetahui keadaan fakta sebenar. Pada masa kejadian, mereka sedang memeriksa sama ada atau tidak premium tertunda adalah yang terkini. Plaintif telah dari mula hubungan dengan defendan, membayar kesemua premium kepada pejabat defendan di Tawau melalui pindahan langsung kepada akaun defendan. Rekod-rekod pembayaran dengan itu adalah pada setiap masa matan dengan pejabat Tawau. Urusan semasa wang yang perlu dibayar kepda akaun plaintif akan, pada setiap masa matan dalam pengetahuan dan dalam rekod-rekod defendan di pejabatnya di Tawau. Ini adalah mencukupi untuk mengatakan atau membuat inferens pengetahuan defendan berhubung keadaan sebenar umsan ansuran-ansuran yang perlu dibayar melalui premium tertunda (lihat perenggan 116).

(3) Perbuatan defendan yang menerima bayaran pembaharuan selewat tiga hingga lima bulan selepas ia patut dibayar ditambah dengan bayaran

ketika dua kejadian dalam masa ini mewajarkan inferens bahawa defendan tanpa berbelah bagi telah menunjukkan kepada plaintif bahawa ia bersedia untuk meninggalkan atau mengetepikan pemakaian ketat fasal premium tertunda berkaitan polisi-polisi berkenaan yang telah dikeluarkan menyebelahi plaintif (lihat perenggan 118(a)).

(4) Dua isu utama yang perlu diadili telah ditentukan menyebelahi plaintif. Plaintif berhak mendapat penghakiman sebagaimana dipohon dan kos. Perbuatan defendan yang berterusan menerima tanpa bantahan premium pembaharuan yang telah tertunggak bukan sahaja membentuk penepian pelucuthakan atau penamatan polisi sebagaimana ditetapkan tetapi kepada penepian am untuk keadaan dalam polisi itu pada masa hadapan yang menghendaki bayaran pada tarikh tertentu (lihat perenggan 118(f) & 120).]

Notes

For cases on hull insurance, see 8(1) *Mallal's Digest* (4th Ed, 2013 Reissue) paras 262–264.

Cases referred to

Elkins v Susquehanna Mutual Fire Insurance Co 113 Pa 386, SC (refd)
Hertford Life Ins Co v Usell 144 US 439 (1881), SC (refd)
Lim Kitt Ping Lynnette v People's Insurance Co Ltd and another [1997] 3 SLR 1018, HC (refd)
Peppit v North British and Mercantile Insurance Co (1879) 13 NSR (1 R & G) 219 (refd)
Smith v New England Mutual Life Ins Co 63 Fed Rep 769 (1894) (refd)

Liew Teck Huat (Lim Qi Si with him) (TH Liew & Partners) for the plaintiff.
Oon Thian Seng (Lo Ee Yee with him) (TS Oon & Partners) for the defendant.

Nallini Pathmanathan J:

INTRODUCTION

[1] The plaintiff's claim against the defendant arises under a Marine Hull policy issued by the defendant, namely Policy No CMMH-PA605419-BRTHTWU, dated 19 September 2010 ('the Marine Hull policy'). The claim was made in respect of the loss of the barge 'Baiduri 27363' when she sank in heavy weather in Paka, Terengganu on 18 December 2010. The claim is for the insured value of the barge, namely RM4.7m less a sum of RM350,000 which the plaintiff recovered by way of salvage. The policy coverage for the barge under the Marine Hull policy is from 19 September 2010–18 September 2011.

[2] Following a grounding incident involving the barge which took place on 18 December 2010, the plaintiff submitted a claim to the defendant for indemnity under the said policy. It is not in dispute that the barge capsized. It is also not disputed that the policy covered loss due to perils of the seas, rivers, lakes or other navigable waters as set out in cl 6.1.1 of the policy.

[3] As a result of the casualty the barge became a sunken wreck. As it posed a shipping hazard, the plaintiff was required to remove the wreck by the Marine Department. The plaintiff duly complied and eventually sold the vessel for scrap and received the sum of RM350,000. The plaintiff now seeks to recover the balance of its losses from the defendant on the grounds that such loss is prima facie covered under the policy.

[4] The defendant repudiated liability from the outset. After the incident on 18 December 2010, the defendant despatched a surveyor to the site. On 6 January 2011 the defendant wrote to the plaintiff denying liability on the grounds that the plaintiff was in breach of a warranty against overloading. In this context the defendant maintains that, at all material times, the barge was carrying 5,406.54 metric tons of granite, when the maximum allowable load was only up to a maximum of 5,000 metric tons. The defendant relies on a draft survey report to establish this fact. To that extent therefore the defendant maintains that the barge was overloaded.

[5] The plaintiff meets this contention by maintaining that although the barge was initially loaded on the night of 17 December 2010 up to a load of about 5,400 metric tons, the vessel did not depart because of the excess load. The plaintiff maintains that instructions were given for the cargo to be discharged such that the load would fall within 4,800 and 5000 metric tons pursuant to a fixture note entered into for this shipment. The plaintiff further maintains that such discharge was carried out until the cargo fell within the acceptable load of about 5,000 metric tons. That the vessel was only loaded to 5,000 tons is, the plaintiff maintains, borne out by a second draft survey report conducted after discharge of the excess load had been completed.

[6] It is evident therefore that an issue of fact for consideration by this court is whether the barge was in fact overloaded when it departed with its cargo on 18 December 2010.

[7] A second ground of repudiation which was subsequently put forward by the defendant in April 2011 was that the policy itself had lapsed for non payment of premium. In this context, the policy when first issued in 2008 contained a 'deferred premium clause'. This clause provides that premium is to be paid by an instalment structure comprising four quarterly payments. The first quarter is due and payable at the inception date and the rest at three month

intervals from inception. The clause also provides that the policy lapses if premium is not received within ten days of the due date. At the time of the casualty the plaintiff had not paid the premium for the policy covering the Baiduri 27363. As such the defendant maintains by invoking the deferred premium clause that the policy had lapsed and that the plaintiff is not therefore entitled to cover under the same.

[8] The plaintiff meets this argument by relying on the doctrine of 'waiver'. The plaintiff maintains that the defendant has, by its conduct, waived its right to rely on the clause. The conduct relied upon by the plaintiff as comprising the factual matrix to support the claim of waiver is that the defendant had, in the past, consistently accepted payment of premium however late it was, and notwithstanding that it did not fall within the instalment structure set out in the deferred premium clause. The defendant moreover continued to maintain coverage throughout, despite these lapses. In support of this contention the plaintiff points to two claims which the defendant paid out notwithstanding that the premium was not paid according to the structure specified in the deferred premium clause. The first is in respect of a claim made in December 2009 when the barge suffered damage to the ram door on 7 September 2009. At that time the fourth quarter of the premium had not been paid. The second claim was in June 2010 when the barge suffered damage due to a collision with a fishing boat on 28 September 2009. At that time the first quarter of the deferred premium clause had not been paid. Notwithstanding this the defendant paid out on the claim on 31 December 2009.

[9] Finally the plaintiff points to the fact that when the current incident on 18 December 2010 occurred, the defendant did not rely on the deferred premium clause to repudiate liability, but instead on a breach of the warranty set out cl 6.1 of the policy namely overloading. They only relied on a lapse of the policy due to non-compliance with the deferred premium clause sometime in April 2011. This, the plaintiff contends, creates an estoppel which precludes the defendant from relying on the same to contend that the policy had lapsed.

THE ISSUES

[10] It is evident from the foregoing that the primary issues before the court are as follows:

(a) was there a breach of the warranty relating to over loading? In other words was the barge, as a matter of fact, overloaded at the time of the incident on 18 December 2010? and;

(b) is the defendant entitled to invoke the deferred premium clause so as to deny liability given its previous conduct. In other words has the

defendant either waived its right to rely upon a strict application of the provisions of that clause or is the defendant estopped from relying on that clause by virtue of its previous conduct? A

[11] In order to answer these questions it is necessary to first consider the salient background facts and evidence. B

SALIENT BACKGROUND FACTS AND EVIDENCE

[12] The salient background facts have been comprehensively set out in the written submissions of the plaintiff as well as the defendant and I adopt the same in the chronology of events below. C

[13] The plaintiff owns a fleet of tugs and barges which are typically deployed under charter arrangements to carry out shipment of material. This complements the plaintiff's business as a general contractor and supplier of building materials and equipment. D

[14] As of 18 December 2010 the plaintiff possessed three pairs of tugs and barges, one of which was 'Tekun 16217/Baiduri 27363'. The director of the plaintiff, who testified on its behalf, one Yee Chung Min, PW1 ('Mr Yee') explained in the course of his evidence that there was adequate insurance coverage particularly hull and machinery coverage for the plaintiff's vessels including Baiduri 27363. He further explained that barges such as the Baiduri 27363 were typically utilised in voyages involving shipments towed by a tug within the coastal waters in the South East Asian region, namely in Malaysia and extending on occasion to Indonesia and Vietnam. The typical cargo would be stones, bricks, sand etc. Such shipments would usually be carried for building contractors who required material for their projects. Such shipments of building materials would normally be by way of charter. The charter would be negotiated following which a fixture note setting out the terms of the charter would be issued. E F G

[15] The Baiduri 27363 is a dumb barge which was built in China. The plaintiff acquired it in 2008 to pair it with the tug Tekun 16217. It was classed with Bureau Veritas and possessed all basic certification. It possessed a Domestic Shipping License valid for the period from 21 October 2010–20 October 2011 issued by the relevant board. The Baiduri 27363 was covered under the policy which was originally issued when the plaintiff first acquired the barge. Such cover was subsequently renewed to cover the period from 19 September 2010–18 September 2011. The sum insured was RM4.8m. Under the policy in cl 6 which deals with the perils insured against, cl 6.1.1 provides that the insurance covers loss of or damage to the vessel caused by perils of the seas, rivers, lakes or other navigable waters. There is also H I

coverage for loss or damage occasioned by the removal of the wreck pursuant to an order from a governmental authority. The policy also incorporates a protection and indemnity clause in cl 9 which is also the subject matter of the claim here. For the policy year 19 September 2010–18 September 2011 the premium paid for coverage was RM55,450. The said sum was paid by debiting the plaintiff's financing facilities with Maybank Bhd and issuing a cheque to the defendant for this sum. The premium for this vessel was paid together with premiums for the plaintiff's three other vessels.

THE INCIDENT

[16] The Baiduri 27363 was at Kuala Paka, Dungun, Terengganu and was deployed to load a cargo of granite in bulk for shipment to Singapore. This was pursuant to a fixture note entered into on 8 December 2010 between the plaintiff and the charterer, China Team International Enterprise Pte Ltd. The fixture note provided that the barge laden with the cargo was to be towed by the tug boat Tekun 16217 from Paka Jetty, Terengganu to Singapore. The cargo agreed to be loaded on board the barge under the fixture note was up to a maximum of 5,000 metric tons.

[17] The vessels arrived at Paka Jetty on 14 December 2010 and a portion of the cargo was loaded late in the night of 15 October 2010. The loading operations proper commenced the following morning at about 8am on 16 December 2010 and continued until 8pm when it stopped because of rain. The operations resumed at 8am on 17 October 2010 and loading was completed at about 9pm. All other procedures including the draft surveys were completed by 0045 on 18 December 2010.

[18] The next stage of the chronology is in dispute. It is the plaintiff's case that at 8.30 on 18 December 2010 the vessel started to discharge a quantity of cargo and this was completed by 1600 hours. Such discharge, the plaintiff maintains was necessitated because the vessel was overloaded to the extent of 400 odd metric tons, which excess had to be reduced. The defendant disputes this, maintaining that such discharge was never effected, but that the plaintiff now alleges such discharge occurred in order to avoid or circumvent the breach of the warranty relating to overloading. In this context it is relevant that the optimum and indeed, maximum load permitted on the barge was 5,000 metric tons.

[19] The plaintiff's third witness, one Beddu bin Kahar, PW3 ('Beddu') was the chief officer of the tug Tekun 16217 that towed the Baiduri 27363 in December 2010. He testified that draft surveys were conducted before and after the loading of cargo. He stated that immediately after the completion of loading, a survey undertaken by the surveyors, Messrs Alex Stewart, disclosed

that the quantity of cargo was in the region of 5,400 metric tons. This first draft survey report was issued by the surveyors and dated 22 December 2011.

[20] According to Beddu, the master and he determined that this quantity of cargo was excessive, and that accordingly some of the cargo had to be discharged prior to the commencement of the voyage. Beddu testified that he was aware of the overloading because the draft survey which was prepared by the surveyor was shown to him and he signed the same. The said draft survey was produced in evidence in the course of trial, and indeed bears his signature which he identified.

[21] Beddu then testified that the discharge of cargo was carried out on 18 December 2010. He stated that he watched or witnessed such discharge, but that the master took control of operations while he worked on the tug. A second survey was then undertaken after the discharge, according to Beddu, which he also had sight of. It was signed off by the master but he was unequivocal in his evidence that he had sighted the same before the master signed off on it. This second survey post discharge showed that the quantity of cargo on the barge had been reduced to 5004 metric tons. As the optimum quantity of cargo for the barge was between 4,800 and 5,000 metric tons the said quantity of 5004 metric tons did not amount to overloading. After this, Beddu testified, the vessel was considered safe to commence the voyage which indeed it did at nearly 5pm on 18 December 2010.

[22] In the course of cross-examination, Beddu was asked whether he had met up with the surveyor who had conducted the survey on board the Baiduri. Beddu testified that he had met up with the surveyor although he could not recall his name. Beddu had accompanied him as he carried out his survey which involved recording data from six positions throughout the vessel. Beddu had affixed his signature on the first draft survey report.

[23] Beddu was also asked about the process of loading and unloading and he explained that this was effected by the use of a lorry that was loaded and driven onto the barge for unloading. An excavator was used to load the granite onto the lorry for transport onto the barge.

[24] He was asked to estimate the number of times in an hour a lorry could effect the loading and unloading, but he was unable to assess the same.

[25] He confirmed that after the loading on 17 December, the vessel had been loaded to 5,400 metric tons as per the first draft survey. He further testified that he informed the surveyor that they could not sail if the quantity of granite was 5,400 metric tons. He also communicated the fact of the load quantity at this stage to the master of the vessel.

[26] According to Beddu the master then communicated with the quarry to discharge a portion of the cargo. This is borne out by the ship's log of activity which discloses that as of 8.40am on 18 December 2010, unloading of the excess cargo commenced. At 12.00 a complete discharge of approximately 350 to 400 metric tons was disgorged from the vessel according to this log. Beddu testified that the master had written this on the log. Both Beddu and the master had signed the log, although Beddu did not fully comprehend English.

[27] Beddu was then cross-examined about the actual process of unloading by learned counsel for the defendant. He described the process of discharge when asked to, explaining that the excavator was moved onto the barge to discharge the load, followed by the lorry whereupon the granite would be loaded onto the lorry by the excavator and transported off the barge. The excavator, he explained remained on the barge while the lorries travelled onto and off the barge, transporting the loads of granite. He further explained that the cargo that was discharged was initially from the front of the load and subsequently moved further in. Beddu also stated that he did not witness the entire process in detail as the master was the person supervising the discharge.

[28] Beddu was then cross-examined about the second draft survey. He confirmed that it was conducted after the discharge operation had been completed. Like the first draft survey he confirmed that he had accompanied the surveyor when he conducted this second survey. He confirmed that when the survey disclosed that the quantity of granite on board the barge was 5,004 metric tons he knew that it was not overloaded because his employer had instructed him that the barge could at any time only carry a load of 5,000 metric tons.

[29] Beddu was unable to identify the surveyor, maintaining that as two years had lapsed and the survey was conducted at night, he was unable to recall or identify the surveyor. He recalled however that for the first survey two persons had been present, while for the second survey only one was present. He was unable to say if it was the same person. Beddu's evidence was corroborated in different aspects by two of the plaintiff's other witnesses, namely one Kha Chai Tian, PW2, an employee of the shipper of the cargo of granite stone aggregates ('Mr Kha') and the surveyor from Messrs Alex Stewart, who undertook the surveys on board the Baiduri, namely one Razi Air bin Mohd Razali.

[30] Mr Kha explained that he was the marketing manager for the shipper who was China Team International Enterprise Pte Ltd ('China Team'). The shipper is involved in the trading of stone aggregates used for the manufacture of concrete and other building materials. He confirmed that he had arranged for a shipment of granite stone aggregates from Paka to Singapore on or about

18 December 2010 on board the plaintiff's barge, Baiduri 27363 to be towed by the tugboat Tekun 16217. He explained that the cargo was totally lost due to the grounding and eventual sinking of the barge on 18 December 2010. His arrangement with the plaintiff for the use of the vessels was by way of a fixture note. Mr Kha further testified that he had negotiated the terms of the charter from Paka to Singapore himself whereby it was agreed that the cargo to be shipped was a minimum of 4,800 metric tons and a maximum of 5,000 tons. Amongst the responsibilities he undertook as charterer was the procurement and conduct of pre-loading and post loading surveys prior to the commencement of the voyage. In this respect Mr Kha utilised his agent, one Absolute Reward Sdn Bhd, their trading agents, to appoint Messrs Alex Stewart to conduct the surveys. Mr Kha further explained that the pre-loading survey was necessary to ensure that the vessels were suitable for shipment and to confirm the weight of the barge prior to shipment. The post loading survey was necessary to ensure that the correct quantity of cargo was loaded before the vessels set sail. This was important to the shipper because if the cargo exceeded 5,000 metric tons, Singapore regulations required pilotage which necessitated the incurring of extra costs. Secondly the purchase order from the purchaser was for 5,000 metric tons and if the quantity exceeded that amount there would be complications in the transaction.

[31] Mr Kha then testified that as a matter of practice the quarry manager would report to him directly on all matters pertaining to the survey and more importantly the final quantity loaded prior to commencement of the voyage. In respect of this voyage, Mr Kha stated that the quarry manager, one Mr Aziz reported to him on completion of loading after midnight on 17 December 2010 (or early morning hours of 18 December) that the quantity loaded was 5,400 metric tons. Mr Kha testified that he told Mr Aziz that this was unacceptable and that a part of the cargo had to be discharged so that the final quantity would go below 5000 metric tons. Aziz subsequently reported to him on the afternoon of 18 December 2010 that the cargo remaining on board was 5,004 metric tons which he found to be acceptable. Accordingly the vessel set sail.

[32] The central witness in respect of this issue of 'overloading' was the surveyor who had conducted the survey from Messrs Alex Stewart. Razi Amir bin Mohd Razali, PW5 ('Razi'). Razi testified that he was involved in conducting the draft survey of the Baiduri 27363 between 15–18 December 2010. Pursuant to a subpoena he had produced the notebooks which contained the survey he had conducted on the Baiduri. In the course of examination-in-chief he went through his note book in relation to the surveys undertaken by him. He testified that on the first page of his note book he had conducted an initial draft survey on 15 December 2010. Excerpts from his notebook were produced and marked P2 A–E respectively.

[33] On the p P2B there were two sections, disclosing what appeared to be a draft survey on the right hand side and another on the left hand side. The left hand side carried the date of 18 December 2010. Razi stated that this was the second draft survey which he recalled had been carried out on the early morning of 18 December. This was done after the loading, according to him.

[34] On the right hand side of the same page was another survey which Razi testified was done on the afternoon of the 18 December 2010. When asked why this survey was done, he stated that he was recalled to undertake the survey. In short he testified that he had undertaken and conducted three draft surveys.

[35] Razi was then referred to an unsigned statement which had been prepared by the defendant's solicitors pursuant to an interview with him. Razi was asked in cross-examination whether the contents of the statement were true. He read the entire statement in the witness box once more and then confirmed that the contents of the statement were in fact correct.

[36] The contents of this statement are of significance as it explains in detail the number of surveys undertaken by Razi (and his colleague Saiful who accompanied him for the first trip) and the mode of doing so as well as the dates. It provides a detailed itinerary of Razi's conduct of the surveys. Without reproducing the entire contents of the statement here, suffice to say that the statement comprehensively sets out and explains the fact that Razi conducted a pre-loading survey on 15 December 2010, followed by the first draft survey when the vessel was fully loaded between 2130 hours and 2300 hours on 17 December 2010. He confirmed that he did all the draft calculations in his notebook after which he handed the same to his colleague Saiful who filled up the Provisional Certificate of Draft Survey, or the first draft survey. Saiful signed this draft survey and Razi confirmed that he witnessed the chief officer countersigning the same. He then sent a short messaging service to one Dato' Joseph of Absolute Rewards, the agent of the shipper, to inform him that the quantity of cargo loaded onboard the barge was 5406.54 metric tons. He left the quarry at 2345 hours on 17 December 2010 and reached Kuantan on the morning 18 December 2010 at 0155 hours.

[37] At 0730 hours on the same day, ie 18 December 2010, Razi's statement, which he confirms to be true, states that he received a call asking him to carry out another final draft survey as the barge was overloaded and about 400 metric tons had to be removed. He stated that he informed Dato' Joseph of Absolute Reward that he had already completed the job whereupon he was asked to carry out a further final survey. Razi maintains that he stated he would do the job 'for free'. He states that he carried out the requested survey without informing his head office.

[38] According to Razi he left for the quarry on 18 December at about 0830 hours and arrived at the Paka Quarry at 0915 hours. According to him, discharge operations were still going on. He remained in his car and watched the entire discharge operation. At 1100 hours he was told that discharge operations had been completed and that he could commence his draft survey. A B

[39] According to Razi's statement he carried out his draft calculations and prepared a Second Provision Certificate of Draft Survey himself. He used a pre-signed form which had been signed by Saiful previously. He carried two sets of signed provisional certificate of draft survey. Each set comprised four carbon copies, the original being white, and the copies being blue, red and one other colour respectively. Having completed the second draft survey he asked the chief officer to sign it. He retained all copies of the second draft survey and left. According to his statement he held on to the white original and gave three copies of the second draft survey to one Khairul of Fenmarie who was at the quarry before leaving for Kuantan. C D

[40] Several days later one Effendi from Fenmarine called him and told him that he needed the final draft report of the 'Baiduri'. He requested for the final draft survey based on the second draft survey. E

[41] Razi then prepared the final or second draft survey report on 22 December 2010. He dated this final second draft survey report 22 December 2010. It disclosed that the cargo loaded on board the barge was 5004.69 metric tons. He prepared two originals of the final draft survey report and signed both originals. He passed one to Fenmarine. He made two further copies of the same and retained the remaining three copies. F

[42] His statement further discloses that he failed to notify his office about the second final draft survey until the insurers' lawyers wrote to his headquarters on this matter. He further confirmed that disciplinary action had been taken out against him for carrying out a survey and issuing a report without giving notice of the same to the office. G

[43] In the course of cross-examination Razi was asked why the draft survey was undertaken in Saiful's notebook rather than his own. Razi then explained that he had in fact first carried out in his notebook and then transferred the details to Saiful's notebook as well. He explained that he had retained two notebooks when he undertook the second final draft survey. H I

[44] Razi was then referred to the first draft survey report and asked whether he knew about this report. Razi confirmed that the draft was issued by the Penang headquarters of Messrs Alex Stewart. However Razi was unaware that

they had issued the first draft report. It was then put to Razi that he did not give either Effendi or Khairul the second draft report on 22 December 2010. Razi insisted that he did.

[45] The foregoing therefore sets out the plaintiff's case on the issue of overloading. The evidence taken in totality explains that there were in fact three draft surveys undertaken, one pre-loading which is irrelevant for the present purposes, and two subsequent surveys, according to Beddu, Mr Kha and most significantly Razi.

[46] Notwithstanding this evidence presented by the plaintiff in relation to the fact of discharge, the defendant heavily disputes that any such discharge in fact took place. The defendant maintains that no such discharge was undertaken. The primary reason for the defendant's stance is the chronology of events that transpired after the incident relating to the sinking of the barge.

[47] The defendant points to the fact that at all material times soon after the incident the only draft survey report that was given to them disclosed clearly that the vessel was overloaded. This in fact relates to the first draft survey report made available to the defendant by Fenmarine (at this stage, it would appear that the defendant had no knowledge of the second draft survey report produced by Razi and dated 22 December 2012).

[48] As the first draft survey report disclosed that the vessel was loaded to the extent of 5,400 metric tons, this amounted to a clear breach of warranty under sub-s 6 of the Marine Hull policy. Accordingly, the defendant, vide letter dated 6 January 2011, issued a notice of repudiation of policy liability on the grounds that the plaintiff had breached the said sub-section which expressly provides that the barge must not be overloaded at any point in time during her operations.

[49] Subsequent to such repudiation of liability, some five weeks later, commencing with correspondence dated 22 February 2011, the plaintiff then produced a second draft survey which showed that the barge was loaded to 5,004.69 metric tons and not 5,406 metric tons. On 23 March 2011 the plaintiff issued a letter to the defendant in response to the defendant's letter of 22 March 2011 enclosing various documents including the second draft survey report bearing reference number ASM/201012/065(A) which confirmed that the quantity of granite loaded on the barge was 5004.69 metric tons.

[50] Given what appeared to be a lengthy delay between the production of the first and second draft survey reports, and the fact that the second final draft survey report was dated 22 December 2010 and produced after repudiation of

the policy, the defendant contends that the second draft survey report is a fabrication, and produced as an afterthought, to rebut the breach of warranty established under the first draft survey.

[51] The defendant further contends, on the basis of the investigation carried out by its surveyors, namely master Maritime Services Sdn Bhd, to ascertain the cause of the grounding of the barge on the morning of 21 December 2010, that the Baiduri 26373 was overloaded while at Paka, Malaysia and thereby breached the warranty in sub-s 6 of the Marine Hull policy. Accordingly their advice was that the plaintiff's claim ought to be repudiated on the grounds of such breach.

[52] In this context the evidence of the investigator, a registered marine surveyor himself, is relevant. Captain Khoo Boo Hock, DW5 ('Captain Khoo') testified that he and his colleague, one Koshy Thomas, were contacted by the defendants on the morning of 21 December 2010 while they were on their way to another job to stop by the vicinity of Paka Quarry and contact the plaintiffs. They went to the quarry site and met the quarry manager, Mr Aziz and members of the crew of the Tekun 16217 including the master, namely one Maguma bin Abdurasid. They observed the condition of the grounded barge the 'Baiduri 26373' and also inspected the site where the cargo was loaded. The methodology adopted in loading the cargo was explained to them.

[53] Then Captain Khoo proceeded to the quarry canteen where they sat with the tug crew to find out about the circumstances surrounding the casualty. Captain Khoo effectively interviewed the crew members and summarised very briefly and in general terms what he was allegedly told. This was forwarded to the insurers the following day, ie 22 December at about 6.14pm by email. A perusal of the email discloses that Captain Khoo advised the insurers that:

(a) the Baiduri was loaded to the extent of 5,400 metric tons and loading was completed at about 23 hours on 18 December 2010;

(b) the vessel sailed four hours after completion;

(c) the draft survey report was not available and Captain Khoo found this puzzling; and

(d) the rest of the email pertains to the grounding of the barge.

[54] Captain Khoo followed up this email with a formal report dated 14 February 2011 where he advises the insurers that there was a breach of warranty namely sub-s 6 of the Marine Hull policy.

[55] In the course of his evidence-in-chief which was furnished by way of a witness statement, it was apparent that Captain Khoo relied almost entirely, as

he had to, on what was allegedly made known to him by the master. As such a considerable amount of his evidence was hearsay. Captain Khoo then sought to procure the draft survey report from Mr Effendi of Fenmarine, who said he would fax the same over to him. They left the quarry in the early evening of 21 December 2010 and returned at 11pm to inquire if towing operations were being carried out. However no towing operations were undertaken.

[56] On 22 December Captain Khoo and his colleague briefed the defendant regarding the incident. They discussed the possibility, according to him, that the barge was overloaded. This was an assessment that Captain Khoo claimed to have made after referring to the hydrostatic tables of the barge. Premised on the same, Captain Khoo concluded that the barge was probably overloaded.

[57] On 23 December 2010 Captain Khoo's colleague sought a copy of the draft survey report which was furnished to them on 24 December 2010. This showed the load to be 5,400 metric tons. This confirmed Captain Khoo's preliminary view that the barge was overloaded.

[58] On 23 February 2011, the defendant sent a copy of the second provisional certificate of draft survey or the second draft survey which disclosed that the load was only 5,004.69 metric tons. Captain Khoo insisted that the contents of the first draft survey was consistent with what he had learnt from the master and Aziz orally on 21 December 2010. Unfortunately Captain Khoo failed or neglected to make any note of his interview with these various personnel.

[59] In the course of cross-examination it was put to him that it was important to conduct interviews with the people who were involved in the casualty. He agreed. He was then asked whether typically such statements would be recorded. Captain Khoo said yes, but later on. It was also put to him that it would be a prudent practice to get the master and crew to sign the written statement to ensure they were committed to the same. Again Captain Khoo agreed but said only if time permitted. He explained that in the instant case they procured the general information verbally as the witnesses had said that they had no time to provide a written statement. He conceded that he never took any statement from the master in the case.

[60] He further conceded that he did not take a statement from Mr Aziz the quarry manager and failed to procure any documentation to bear out Mr Aziz's statement that the quantity of cargo was 5,400 metric tons. In short it would appear that the entirety of Captain Khoo's report was premised on oral hearsay without the benefit of recorded written statements from the direct participants, but rather reflected Captain Khoo's recollection of what he had been told orally

during the visit on 21 December 2011. As this evidence is largely hearsay and was not substantiated in any way by written recorded statements, the admissibility and veracity of the same are in issue. Captain Khoo's evidence, as hearsay, cannot amount to a verification of the quantity of cargo loaded on the vessel at the material time. It can, at best, only show or prove that this is what he was told. As such it is of no probative value for purposes of ascertaining whether the vessel was, as a matter of fact, over loaded or not.

[61] Captain Khoo was also queried about what he did after he was given the second draft survey. He confirmed that he received no further instructions to conduct investigations into the second draft survey. He explained that upon receiving the same, he advised that he had never seen it and that they were surprised. He took no further action because he received no further instructions to do so from the defendant.

THE EVIDENCE OF THE EXPERTS

[62] Both the plaintiff and the defendant called expert witnesses who agreed on the following:

(a) the defendant's expert witness, Richard Norman Howe, however sought to make the additional point in the course of his testimony that in the event 500–600 metric tons of cargo had been removed from the front of the barge, the barge would have swung heavily like a pendulum or see saw, as the taking of such a quantity of cargo from the front would be equivalent to the taking of 11% out of the total amount of cargo on board the barge. In order to maintain the trim, he maintained that it would be necessary to transfer about 350 tons of cargo from the end of the aft of the Barge to the forward end of the barge to make it balanced. Learned counsel for the defendant maintained that Beddu had stated that the cargo was removed from the front of the barge.

However a perusal of Beddu's evidence in full does not in fact disclose any such testimony. Beddu testified that the cargo was removed commencing from the front of the barge and moving toward the back. The expert's conclusion therefore is premised on a factual matrix which was not the evidence of the chief officer. To that extent it is not relevant; and

(b) a further point made by the defendant's expert witness that it was 'impossible' to remove 500–600 metric tons from the barge and make it nicely trim to almost even keel within 3.5 hours. However this in itself is not of great assistance in disproving the plaintiff's witnesses direct evidence that discharge did in fact take place although it was only 400 odd metric tons that were in fact discharged. The evidence discloses that the entire discharging process took about 7.5 hours.

[63] The foregoing then encapsulates the opposing and conflicting evidence put forward by the plaintiff and defendant. The issues set out above now fall for consideration.

Issue (a): Was there a breach of the warranty relating to over loading? In other words was the barge, as a matter of fact, overloaded at the time of the incident on 18 December 2010?

[64] I have considered the totality of the evidence pertaining to this issue. On the facts of this case, while the burden lies on the plaintiff to prove that it falls within the purview of the Marine Hull policy in order to claim an indemnity, this is not in issue as the fact of the barge grounding in or around 27 December 2010 is not disputed. The matter that arises for dispute is in fact whether or not there was a breach of the warranty pertaining to overloading, as has been explained exhaustively above. The onus lies on the defendant to show that the plaintiff was in breach of this warranty.

[65] From the evidence set out above, it is evident that the sole issue of fact that requires adjudication is whether or not discharge of the cargo took place on 18 December 2010 after the initial loading when it was found by virtue of the first draft survey that the vessel was overloaded by about 400 metric tons. In this respect I have considered on the one hand, the evidence of the chief officer, Beddu, the shipper's employee, Mr Kha and most significantly that of the surveyor Razi Azmi. They have all provided detailed and comprehensive testimony as to what happened between 15 December and 18 December 2010 when the vessel set sail on its intended voyage to Singapore.

[66] A consideration of their evidence taken in totality discloses that both Beddu and the surveyor had as a matter of fact witnessed the discharge of cargo on 18 December 2010. Both witnesses described the same. They maintained their testimony notwithstanding stringent cross-examination. A consideration of their evidence particularly that of Razi Azmi discloses that it would be extremely difficult to fabricate the fact of discharge as well as a second fraudulent draft survey report as is now contended by the defendant. In any event in the course of trial there was nothing said in the course of cross-examination that would warrant such a conclusion.

[67] Such a contention was not even directly put to these witnesses. In fact it was not put to Beddu that the fact of discharge had not taken place and that he was fabricating the same. Neither was it directly put to Razi Azmi that he had fabricated and fraudulently produced the second draft survey report.

[68] It must be borne in mind that Razi Azmi is a witness who is not aligned

to either the plaintiff or the defendant. In fact, the evidence discloses that he gave a detailed statement to the defendant's solicitors first, although he did not sign the same, setting out the circumstances in which he produced the second draft survey report. It would therefore appear that the defendant was well aware of Razi Azmi's testimony well before the trial. Such evidence explained comprehensively the chronology of events, the true nature of which was suppressed by Razi Azmi's failure to keep his head office advised of the second preliminary draft report.

[69] The contents of this statement, which Razi Azmi confirmed to be true in the course of his evidence-in-chief, were not refuted in the course of cross-examination. More importantly he produced his original books and that of his colleagues disclosing that he conducted a total of three draft surveys, one pre-loading and two post-loading. The second post-loading survey was after the discharge of 400 metric tons, bringing the weight of the cargo to within the acceptable limit of 5,004.69 metric tons. Razi Azmi also testified under oath that he witnessed the discharge of the subject cargo.

[70] I have considered the suggestion put forward by the defendant that Razi Azmi is not telling the truth and that the second preliminary draft survey is a fabrication, but there is simply no evidence whatsoever to warrant such an inference or conclusion. The defendant has called no independent evidence to support such a serious allegation of fraud. Neither, as I have set out earlier, was any such suggestion put directly to any of the witnesses. I therefore reject the defendant's contention that Razi Azmi and Beddu are being less than truthful, and accept their evidence as being an accurate representation of the facts, to the best of their memories.

[71] Given the direct evidence of Beddu and Razi Azmi which is further corroborated by Mr Kha who confirmed that he gave instructions for discharge, it appears to this court that while the barge was initially overloaded on 18 December 2010, it did not set sail in this overloaded condition. I accept the evidence of Beddu, Razi Azmi and Mr Kha that an unloading or discharge operation proceeded after the first draft survey had been completed, resulting in a discharge of some 400 metric tons of the cargo. As such when the vessel set sail on 18 December 2010 it was not overloaded and there was accordingly no breach of sub-s 6 of the Marine Hull policy.

[72] In this context I reject the evidence of Captain Khoo as comprising largely hearsay, and being devoid of any substantiation. There were no recorded statements on which he relied, merely his memory and his very brief record of events, sent to the insurers on 21 December 2010. More pertinently the failure to take any steps to investigate or ascertain the basis for the second preliminary

certificate renders the investigation incomplete and unreliable for the purposes of ascertaining the truth of whether or not the vessel was overloaded.

[73] On the first issue, therefore, I have no hesitation in concluding that there was no breach of the warranty contained in sub-s 6 of the Marine Hull policy, precluding the plaintiff from making claim under the same.

Issue (b): Is the defendant entitled to invoke the deferred premium clause so as to deny liability or has the defendant waived its right to rely upon a strict application of that clause, or is the defendant estopped from reiving on that clause by virtue of its previous conduct?

[74] The deferred premium clause in the Marine Hull policy provides as follows:

> Notwithstanding anything herein to the contrary, the premium or consideration for this Assurance is payable by instalment as follows: —
>
> One-quarter is due and payable at Inception date.
>
> One-quarter is due and payable (3) months after Inception date.
>
> One-quarter is due and payable (6) months after Inception date.
>
> One-quarter is due and payable (9) months after Inception date.
>
> In the event of any instalment not being received prior to or within 10 days after the due date as above, this Assurance shall be deemed to have ceased at midnight of such due date.

[75] It is not in issue that the Marine Hull policy dated 19 September 2010 was issued for the period from 19 September 2010–18 September 2011. The due date of the first instalment payment of premium under the deferred premium clause as set out above is within ten days of the inception date. The inception date is 19 September 2010 so the premium was due and payable within ten days of that date, namely 29 September 2010.

[76] However no such payment was made and the defendant maintains that accordingly in view of the breach of the deferred premium clause the insurance ceased to have effect on or by 30 September 2010. The incident here took place on 18 December 2010 and on this basis the defendant denies liability in respect of the indemnity claimed by the plaintiff.

[77] The facts disclose that the defendant itself only issued a debit note seeking payment of the first deferred premium instalment due in September 2010 on 20 December 2012, some three months after it was due.

[78] The incident it will be recalled took place on 18 December 2010 and the insurer was advised on 21 December 2010.

[79] The plaintiff did not make immediate payment but made payment several months later, relying on the fact that it had in the past similarly made late payments which had been accepted as set out above. On 3 March 2011 the plaintiff issued a letter to Maybank to effect the transfer of funds for the premiums of policies, pursuant to which, on 7 March 2011, the sum of RM113,325.52 was debited from the plaintiffs' account to the defendants' account.

[80] On 21 April the defendant's solicitors issued a letter to the plaintiff setting out a second ground for the repudiation of the policy liability and sought the plaintiff's account details to return the premium of RM55,450.

[81] When DW1 was cross-examined as to whether or not they had ascertained the status of the policy in relation to the deferred premium clause at the time of the incident, the reply was that this was one of the matters that the defendant sought to check, namely whether premiums were up to date. Notwithstanding this, there was no indication from the defendant until some four months subsequently that the deferred premiums had been tendered out of time.

[82] The deferred premiums had been paid to the defendant in its Tawau office. It was open to the defendant to ascertain the status of the plaintiff's policy soon after the incident by checking with its Tawau office. However this was not done until some four months later. This delay coupled with the defendant's focus on ascertaining whether the vessel was in breach of its warranty not to overload, shows that at the time when the policy was repudiated the defendant did not in fact rely on the late payment of the deferred premium, but merely on a breach of warranty.

[83] It must be said that prior to this and after the incident, the defendant did not raise this ground of a failure to comply with the deferred premium clause but proceeded to deal with the plaintiff's claim by appointing an investigator and taking the necessary steps to consider the plaintiff's claim prior to repudiating the same for a breach of the warranty under sub-s 6 of the policy. In other words, the issue of the effect of non-compliance with the deferred premium clause was not raised until 21 April 2011.

[84] The defendant has sought to return or refund the late payment of the deferred premium clause maintaining that the policy lapsed as of 30 September 2010 well before the incident. It is noteworthy that while the defendant refunded the premium relating to the Baiduri 27363, it retained all other

premia relating to the plaintiff's other vessels, in respect of which the deferred premiums had also been delayed. In other words, the defendant chose to reject only the policy relating to the Baiduri, while validating the other policies relating to other vessels belonging to the plaintiff.

[85] The plaintiff therefore maintains that the defendant has, by its past conduct, accepted late payment of such premiums, and that accordingly, the defendant has waived its right to treat the policy as having lapsed. What then is the past conduct that the plaintiff relies upon? It is the plaintiff's evidence through a director of the plaintiff, namely Yee Chung Min, that the deferred premium clause was incorporated into the policies from the outset for all of the plaintiff's vessels that were insured with the defendant. In all these policies the clause provides, similarly, that the premium for each policy year was to be paid in four quarterly instalments.

[86] However from the inception of these policies in 2008 including that relating to the Baiduri 27363, payment had never been made in accordance with the clause but had been accepted nonetheless by the defendant without question. Moreover the defendant had maintained coverage.

[87] Payments for the deferred premium were made directly to the defendant's branch office in Tawau, and they accepted payment without question or protest notwithstanding that the payments were not in accordance with the schedule of the deferred premium clause.

[88] This is borne out by the payment vouchers and other documents produced by the plaintiff in evidence which shows that deferred premium instalments were in fact paid as late as four to six months after the due date and duly accepted by the defendant's Tawau office and valid receipts issued for the same. In other words the policies were treated as valid and subsisting in the past notwithstanding that payments were made several months after the due date. The consequence of late payment, namely that the policy would lapse appears to have been simply ignored and the policies treated as valid.

[89] For example a payment voucher issued dated 14 September 2009 for payment of deferred premiums due for the Tugboat Tekun 162717 and Baiduri 27363 on 14 May 2009, appear to have been received and accepted and the policy treated as subsisting notwithstanding the late payment of four months after the due date. Similarly a payment effected on 6 May 2009 for deferred premiums due on these same vessels as a second instalment with a due date of 19 December 2008 were similarly accepted and received and the policy treated as valid and subsisting despite payment being effected five months after the due date.

[90] And payments made on 3 March 2009 for instalments due on 19 December 2008 were similarly accepted notwithstanding that the payments were made three months after the due date.

[91] A perusal of the full portfolio of documents produced by the plaintiff discloses similar delays in all payments of deferred premiums, which were received and accepted by the defendant with no protest whatsoever.

[92] A further salient feature is that notwithstanding the late payment of these deferred premiums, the insurer paid claims on these policies in December 2009 and June 2010, notwithstanding that the premium for those periods were still not paid at that stage in accordance with the deferred premium clause.

[93] One was a claim for damage to the barge resulting in the loss of the ram door of the barge which occurred on 7 September 2009. This claim was made under the policy year 2008/2009 according to PW1. At that time the fourth quarter of the premium under the deferred premium clause had still not been paid. Notwithstanding this, the defendant paid out under the claim.

[94] The next claim was made for damage to the tugboat due to a collision with a fishing boat in Vung Tau Vietnam on 28 September 2009. The claim was paid out on 31 December 2009, notwithstanding that at the time the first quarter of the deferred premium clause was still outstanding as it was paid only in January 2010.

[95] The final salient facts are that the debit note for the deferred premium instalment due in September was issued out of time, on 20 December 2010, thereby making compliance with the clause impossible.

[96] Payment was effected by the plaintiff (as set out earlier) in March 2011 for deferred premiums due in respect of the Baiduri 27363 as well as the plaintiff's other vessels. Payment for these other vessels was also out of time.

[97] There was initially on response from the defendant but about one month later, on 21 April 2011, the defendant sought to refund only that portion of the premium paid in respect of the Baiduri, purporting to treat the said policy as having lapsed.

[98] The foregoing therefore comprises the factual matrix on which the plaintiff predicates its claim of waiver or estoppel.

THE LAW RELATING TO WAIVER AND ESTOPPEL

[99] *Halsbury's Laws of England*, (4th Ed), Reissue — Vol 9(1) at para 1025 defines and explains 'waiver' as follows:

A 'Waiver' is a vague term used in many senses. It is sometimes used in the sense of an election ('waiver by election') as where a person decides between two mutually exclusive rights … 'Waiver' is also used to describe the situation where a party prevents performance or announce that he will refuse performance. In the law of contract, 'wavier' sometimes refers to a variation of contract supported by consideration; or it may refer to the act of an innocent contracting party to affirm the contract after serious breach; or it may describe the election of the innocent party to abandon all rights in respect of a breach of contract. *However, in contract it is most commonly used to describe the process whereby one party unequivocaliy, but without consideration, grants a concession or forbearance to the other party by not insisting upon the precise mode of performance provided for in the contract, whether before or after any breach of the term waived. A waiver by estoppel or forbearance in this sense is to be distinguished from a variation; a variation is supported by consideration and cannot be retracted unilaterally; but a waiver or forbearance is without consideration and may prima facie be retracted unilaterally.*

D The validity of a waiver by estoppel or forbearance at common law has been considered in two main contexts:

(1) …

(2) whether a party who has waived a particular term of, or claim under, the contract (either at the request of the other or not) may go back on his concession and insist on performance in accordance with the exact terms of the contract. (Emphasis added.)

Chitty on Contract (13th Ed), defines 'waiver' thus:

F Waiver or forbearance. Where one party voluntarily accedes to a request by the other that he should forbear to insist on the mode of performance fixed by the contract, the court may hold that he has waived his right to require that the contract be performed in this respect according to its original tenor. *Waiver (in the sense of 'waiver by estoppel' rather than 'waiver by election) may also be held to have occurred if, without any request, one party represents to the other that he will forbear to enforce or rely on a term of the contract to be performed or observed by the other party, and the other party acts in reliance on that representation.* (Emphasis added.)

Effect on party forbearing. The party who forbears will be bound by the waiver and cannot set up the original terms of the agreement. If, by words or conduct he has agreed or led the other party to believe that he will accept performance at a later date than or in a different manner from that provided in the contract, he will not be able to refuse that performance when tendered …

I **[100]** It is evident from the foregoing that in the context of the present factual matrix the dispute between the plaintiff and the defendant centres on whether or not the doctrine of waiver by estoppel comes into play to preclude the defendant from relying on the strict terms of the deferred premium clause in the policy, to refuse or negate payment under the policy on the grounds of its past conduct, or whether it does not operate in the given factual matrix.

[101] Put another way, the issue for consideration is whether the defendant is entitled to rely on the strict terms of the deferred premium clause, which provides that the policy is deemed to have ceased if payment of the relevant instalment payment is not received within ten days of its due date, or whether the defendant's previous conduct in accepting late payment on several occasions and making payment out on claims despite such late payment, amounts to a representation to the plaintiff that it will forbear to enforce or rely on the strict terms of the deferred premium clause in the contract, and the plaintiff acts in reliance on such representation.

[102] In *MacGillivray on Insurance Law*, (11th Ed), (Sweet & Maxwell), the learned authors have dealt comprehensively with the issue of waiver:

> A waiver of a term relating to the payment of premium may take the form of an election or an estoppel. Promissory estoppel involves an unequivocal representation that the insurer does not intend to rely upon a right arising by reason of non-payment and action, or inaction, on the part of the assured in reliance on the representation, such that it would inequitable for the insurer to enforce rights inconsistent with the representation …

[103] The aforesaid text states, relevantly, that there are numerous cases in the US courts where it has been held that the conduct of the insurers in continuing to accept without objection renewal premiums which are overdue may amount not only to a waiver of the forfeiture on each particular occasion but to a general waiver for the future of the conditions in the policy requiring payment on a particular date, (see *Elkins v Susquehanna Mutual Fire Insurance Co* 113 Pa 386 (Sup Ct Pa, 1886).

[104] In *Smith v New England Mutual Life Ins Co* 63 Fed Rep 769 (1894) Butler J held that:

> There is no room for question about the rules of law applicable. A course of dealing which justifies the assured in believing that punctuality in paying premiums is not required or will be excused will relieve him from the consequences of delay. But it must be dealing which actually creates such belief, and justifies a jury in finding its existence.

[105] And in *Hertford Life Ins Co v Usell* 144 US 439 (1881), a Supreme Court case, the following direction to the jury was approved:

> If the company by its conduct led the assured, as a reasonable and prudent business man to believe that he could make payments a few days after the due date, sick or well, it cannot turn around now and say, 'You did not pay at the time'. I cannot say to you as a matter of law that one receipt after the time specified would make a waiver or that fifty would. It is not in the numbers. The question is for you to

A consider and determine from all of them, and from the whole course of business, whether as a prudent business man, he had a right to believe that it was immaterial whether he paid on the day or a few days later. If the course of conduct was such that he had a right to believe that he could pay only in good health then there was no waiver applicable to the case.

B

[106] And in *Peppit v North British and Mercantile Insurance Co* (1879) 13 NSR (1 R & G) 219 the evidence showed that it was not the practice of the company to insist on performance of the condition as to renewals, and that they had, in fact, renewed the policy in question without insisting on
C prepayment of the premium.

[107] Another instructive case is that of *Lim Kitt Ping Lynnette v People's Insurance Co Ltd and another* [1997] 3 SLR 1018. This case involved motor
D vehicle insurance. The plaintiff's car was insured with the first defendant insurer through the second defendant insurance broker. A premium warranty clause was appended to the policy. Clause 1 provided that it was a condition precedent to liability under the policy. Clause 2 provided that if the premium was not paid in full, the cover would be deemed to have terminated from the
E expiry premium warranty period. This is similar to the instant case where the deferred premium clause provides that the policy would cease to be of effect if instalments are not paid within ten days of the due date.

[108] Here the insurance broker forwarded the required documentation to
F the insurer in April 1991 but the insurer did not issue a policy or collect the premium immediately. The policy was issued on 25 June 1991 together with a debit note for the premium. The plaintiff met with an accident about a month later on 30 July 1991, resulting in damage to the vehicle.

G **[109]** The premium was paid to the insurer by a cheque dated 30 October 1991. The insurer issued its receipt only three months later, as it took legal advice before presenting the cheque for payment. When however the plaintiff sought to make claim under the policy the insurer disclaimed liability on the ground that the cover under the policy was terminated at the expiry of the
H premium warranty period, pursuant to the premium warranty clause. The insurer sent a cheque for the refunded premium. Justice Kan Ting Chiu held, inter alia, that as the insurer had issued the debit note out of time the inference could be drawn that the insurer had waived compliance with the premium warranty clause:

I

By their (insurers') delay in issuing the debit note, the insurers had rendered compliance with the premium warranty clause impossible. When they issued the debit note out of time, it must be inferred that they waived compliance of the premium warranty clause.

[110] And further on:

> A fortiori when the insurers accepted the premium they waived the condition that premium must be paid in compliance with the premium warranty clause. By their conduct they were estopped from relying on the premium warranty clause.

[111] This case is relevant to the present as in similar vein the debit note for the payment of the first instalment of the deferred premium was issued well after the due date, making compliance with the same impossible. By analogy it may be inferred that the defendant waived strict compliance of the deferred premium clause.

APPLICATION OF THE LAW TO THE PRESENT FACTUAL MATRIX

[112] The issue before the court here is whether the insurers by their conduct as set out above at the outset, discharged the assured, ie the plaintiff from the necessity of complying with the strict terms of the deferred premium clause in the policy when the plaintiff made late payment of the premium in April 2011.

[113] The precise acts that are relied upon by the plaintiff to establish such waiver by estoppel are the series of late payments made over the years by the plaintiff to the defendant in respect of overdue or late instalment payments of the deferred premiums. Additionally the plaintiff also relies on the fact not only of acceptance of such late payment and renewal of the policy, but also the fact that the defendant on more than one occasion paid out on claims made, notwithstanding late payment of premiums. This conduct, which stretched over a period of no less than three years, comprises sufficient basis, it is contended, to warrant a finding of waiver by estoppel in relation to the late payment of premium for the policy prevailing at the time of the incident.

[114] With respect to the policy in issue here, it is further pointed out that the defendant's notice requesting for payment of the first instalment payment was only effected some three months after the due date, on 20 December 2010.

[115] The plaintiff also relies on the fact that despite the reporting of the incident in or around December 2010, when the premiums were due, the defendant proceeded to investigate and act on the same with a view to ascertaining whether or not to provide cover and in fact repudiated liability on entirely separate grounds on 6 January 2011 without asserting or relying on non-payment of premiums. In other words the defendant acted at all material times as if the policy was in force.

[116] For waiver to bite, the insurer, ie the defendant must have known or had the opportunity of knowing the true state of facts. In the instant case,

DW1 stated in the course of her evidence that at the time of the incident, they were checking whether or not the deferred premiums were up to date. It also transpired in the course of cross-examination that the plaintiff had from the commencement of its relationship with the defendant, paid all premiums to the defendant's Tawau office by direct transfer to the defendant's account. The records of payment were therefore at all material times with the Tawau office. The state of affairs of the monies due on the plaintiff's account would, at all times have been within the knowledge of, and in the records of the defendant at its office in Tawau. This is sufficient to impute or infer knowledge of the defendant as to the true state of affairs of the instalments due by way of deferred premiums.

[117] The Tawau office of the defendant also accepted payment of the premiums due in or around March 2011, before the defendant's solicitors wrote to the plaintiff's solicitors almost one month later, seeking to return such monies, and treat the policy as having lapsed. It appears to this court on a consideration of the entirety of the evidence, both of the plaintiff and the defendant that:

(a) there were no less than five recorded instances of the plaintiff having tendered the deferred premium payments well after the due date. In all instances the length of this delay extended from approximately 3–5 months;

(b) on all these occasions, the defendant's branch office in Tawau, which had charge of the collection of these premiums, accepted the same without protest or objection;

(c) on two occasions when the plaintiff made claims under the policy, the defendant paid out on the same, notwithstanding that deferred premium payments had been paid late and other instalments were due; and

(d) in reliance upon the defendant's conduct, it would appear that the plaintiff continued to make late payments, believing that the policy would be renewed and remain in force notwithstanding late payment; in other words the plaintiff relied on the fact that the defendant did not hold the delay in making payments against it in relation to the subsistence of the policy.

[118] From the foregoing the following matter may be inferred:

(a) the defendant's conduct in accepting the renewal payments as late as 3–5 months after they were due coupled with payment out on two incidents during this time warrant the inference that the defendant unequivocally represented to the plaintiff that it was prepared to forbear or excuse the strict application of the deferred premium clause in respect of the respective policies that were issued in favour of the plaintiff;

(b) these policies were renewable on a yearly basis and notwithstanding the delay in the payment of the deferred premium, in contravention of the terms of the clause, the defendant nonetheless accepted the same and renewed the policy of insurance yearly. It is this renewal despite late payment of the deferred premium that constitutes the unequivocal representation by the defendant;

(c) the plaintiff, relying upon such express representation, namely that the defendant would continue to renew the policy notwithstanding late payment of anything from 3–5 months, continued to make late payments for the renewal premiums due for the prevailing policy at the time of the incident, namely from 19 September 2010 to 18 September 2011;

(d) for this particular policy, in any event, the defendant only issued the debit note demanding payment of the first instalment some three months after the due date, rendering strict compliance with the deferred premium clause impossible. To that extent the plaintiff acted to its own detriment in relying upon the defendant's express representations that it would accept late payment of deferred premiums;

(e) in this context I find that the defendant had knowledge of the state of affairs pertaining to the plaintiff's account in relation to deferred premium payments, because the defendant's Tawau office had full cognisance of the same. The knowledge of the Tawau office is necessarily attributable to the defendant, its principal; and

(f) as such the conduct of the defendant in continuing to accept, without objection, renewal premiums which are overdue, amounts not only to a waiver of the forfeiture or cessation of the policy as stipulated, but to a general waiver for the future of the condition in the policy requiring payment on a particular date, (ie for the payment due in 2010 but received in 2011).

[119] I therefore find on the basis of invoking the doctrine of waiver by estoppel that the policy for the period 19 September 2010–18 September 2011 remains valid and subsisting notwithstanding the late payment of the deferred premium payments in March 2011.

[120] As the two primary issues falling for adjudication have been determined in the plaintiff's favour, the plaintiff is entitled to judgment as prayed for and costs.

Claim allowed.

Reported by Afiq Mohamad Noor